

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1340

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOSEPH JOYCE,

Defendant-Appellant.

Docket No. 77-1340

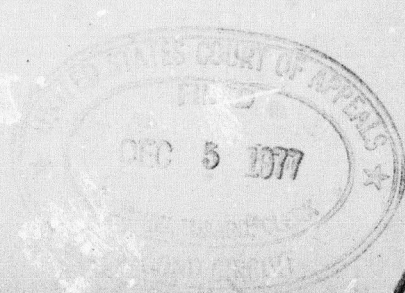
REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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POINT I

In responding to appellant's Point I, which argued that the evidence of knowledge was insufficient to establish appellant Joseph Joyce's guilt, the Government has advanced numerous factual statements which are inaccurate and which provide a distorted picture of the evidence. In this supplemental point, we seek to correct several of the most important misstatements.

1. The Government states: "Fisher recalled telling Joyce that, contrary to the sales pitch, the bulk of the tapes that would be provided to the distributors would not be major label tape recordings." (Brief at 11.) In truth, the best that may be said about Fisher's testimony is that he assumed he had told this to Mr. Joyce, for while he suggested that "I would tell it to all of the salesmen," he did not specifically testify to having had any such conversation with Mr. Joyce. An assumption is not the legal equivalent of a fact with regard to the requirement of knowledge (see United States v. DiStefano, 555 F.2d 1094 (2d Cir. 1977)).

More significantly, the Government omits the crucial fact that Mr. Fisher appears to have expressly renounced this assumption after hearing his grand jury testimony in which he unequivocally denied giving this information to the salesmen:

I didn't tell salesmen that they weren't going to get them. You have to keep that out of the salesman's mind or else he may reiterate it or he don't believe in it, himself.

(T.212.)

Mr. Fisher stated that this statement was true (T.213). He also thought aloud: "... may not told him [Joyce]" (T.214; emphasis supplied). None of these facts is noted by the Government in its brief.

2. The Government asserts that "[Mr. Fisher] told Joyce that one of the individuals on the list of so-called references

was in fact his wife." (Brief at 11.) The Government has again taken as unassailable fact the mere assumption by Mr. Fisher. He did not testify that he told Mr. Joyce specifically that his wife was one of the "singers;" he arrived at this conclusion only because "all of them [the salesmen] met my wife." (T.202.)

Moreso, this allegation is severely undercut by a fact the Government ignores: Mr. Fisher's wife was listed as "Rachel Green," not "Rachel Fisher," on the singers' list, and Mr. Fisher introduced her to the salesmen only as "Rachel" (T.203). Thus, there was no basis for Mr. Joyce to have made a connection between the Rachel whom he met as Mr. Fisher's wife and the Rachel Green who appeared on the singers' list.

3. The Government claims that after Mr. Joyce affixed the addendum to the Suk contract, "Richard Taylor told Joyce that MDI had no intention of delivering merchandise of the quality of top label tapes, as advertised." (Brief at 11.) Actually, Mr. Taylor never testified that this conversation concerned "top label tapes;" the addendum in question specified 300 backup tapes from the top ten Billboard listings, and it was this narrower and more selective category that Mr. Taylor had no intention of delivering (T.73-74, 128). Assuming that this conversation did take place, it would not have indicated to Mr. Joyce that the company did not intend to deliver major label tapes, but only that such tapes could not be exclu-

sively top ten Billboard listings. Since these most popular tapes could have been in short supply, Mr. Joyce could fairly assume that Mr. Taylor's directive arose from the impossibility of filling orders; he had no reason, however, to conclude that major label tapes could not be furnished.

4. To support its claim that appellant's knowledge of the illegal scheme was demonstrated by the low price at which he offered the tapes, the Government recites the following testimony: "Thus, when Bovey met Joyce, having contacted him through the Boston Globe, he questioned Joyce closely concerning ... how MDI was able to provide top label tapes at only \$2.00 per tape." (Brief at 6.) The Government uses this "fact" to show that appellant had knowledge of the illegal scheme by suggesting that this conversation revealed Mr. Joyce's awareness that the price of the tapes was impossibly low and to prove that Mr. Joyce's denial of that conversation (T.326) was a lie (Brief at 9). In truth, the record of Mr. Bovey's testimony indicates that, contrary to the Government's recital, he never questioned Mr. Joyce as to Mr. Joyce's ability to provide the tapes at \$2.00 (see T.237-241).

5. The Government, relating the testimony of William Melleody, alleges: "Joyce falsely added that he himself had sold distributorships to one of the people on the [singers'] list, a Linda Barclay." This is not what Mr. Melleody said. He indicated that Mr. Joyce had made a statement about Linda

Barclay and her having travelled to see him to obtain information about the tape business; but when asked by the prosecutor whether Mr. Joyce had stated that he had sold a distributorship to Ms. Barclay, Mr. Melleody did not answer affirmatively and conceded that that was the "implication" of Mr. Joyce's remarks (T.29). It is inaccurate to attribute to Mr. Joyce an intentional misrepresentation (Brief at 13 n.14) when the mistake may have been in Mr. Melleody's interpretation.

6. The Government, after reviewing several of the facts concerning Mr. Joyce's background in tape sales, asserts: "Thus, it is clear that Joyce was no newcomer to the tape distributing business." (Brief at 11.) Nowhere in its brief does the Government acknowledge the fact that Mr. Joyce's only previous tape sales experience lasted a total of two and one-half months (T.295, 301).

7. The Government advances two claims that are so disingenuous as to warrant comment. First, the Government states: "He [Mr. Joyce], not Taylor or Fisher, made the false representations." (Brief at 14.) Though the Government may feel obliged to protect the integrity of its witnesses, this statement is an insulting distortion of the trial. However this Court resolves the question of Mr. Joyce's guilt, nothing will diminish the fact that Mr. Fisher -- who testified under a grant of immunity -- and Mr. Taylor -- who testified in exchange for a reduced plea -- were the chief architects of the fraud and were men who

freely employed false representations to mislead the salesmen and to deceive their customers.

Second, the Government asserts that, because "his sole source of compensation was from commissions ... Joyce's stake was no less than the officers of MDI." (Brief at 15.) Though the Government makes no reference in its brief to the financial benefits reaped by Mr. Taylor and Mr. Fisher for their part in instituting this fraud, suffice it to say that, in addition to all their expenses, they secured gains which were substantial (Appellant's Brief at 36). To equate Mr. Joyce's interest in the venture to that of these gentlemen simply because he received some moderate earnings from his sales efforts is to miss the thrust of our contention: while Mr. Joyce earned a salesman's wages by doing a salesman's job, the officers sought inordinate profits by using the only quick means to this end -- fraud.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief of appellant, the judgment of the district court should be reversed and the indictment as to appellant Joseph Joyce dismissed; alternatively, the judgment of the district court should be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 5, 1977

I hereby certify that a copy of this ^{reply} brief ~~and~~
~~appendix~~ has been mailed to the United States Attorney
for the Eastern District of New York.

Steven Hyl Bann